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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 NATHAN HILL,

12 Petitioner,

13 vs.

14 LOS ANGELES COUNTY
15 COURTHOUSE CORPORATION,

16 Respondent.

No. CV 17-4103 AG (FFM)

ORDER SUMMARILY DISMISSING
PETITION WITHOUT PREJUDICE

17 On or about June 1, 2017, petitioner constructively filed a Petition for Writ
18 of Habeas Corpus by a Person in State Custody (the “petition”) pursuant to 28
19 U.S.C. § 2254. (Dkt. 1.) The petition challenges petitioner’s 2017 convictions for
20 assault (Cal. Penal Code § 245) and resisting arrest (Cal. Penal Code § 69). (*See*
21 *generally id.*)

22 Petitioner states that he is unsure whether his attorney filed a notice of
23 appeal on his behalf. However, the Court takes judicial notice of California Court
24 of Appeal records (located on the California Court of Appeal case information
25 website, <http://www.courts.ca.gov/courtsofappeal.htm>) which show that on April
26 12, 2017, petitioner appealed the convictions challenged here. *See Porter v.*
27 *Ollison*, 620 F.3d 952, 945-55 (9th Cir. 2010) (courts may take judicial notice of

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1 state court records found on the internet). That appeal remains pending before the
2 California Court of Appeal.

3 Generally, a federal court may not consider the merits of a habeas corpus
4 petition challenging a state-imposed judgment unless the habeas petitioner has
5 exhausted his state-court remedies with respect to every claim presented in the
6 petition. *See* 28 U.S.C. § 2254(b)(1)(A); *Rose v. Lundy*, 455 U.S. 509, 518-22
7 (1982). Exhaustion requires that the petitioner fairly present each claim in the
8 petition to the highest court of the state that imposed the challenged judgment.
9 *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). A federal court may raise the
10 failure to exhaust issues *sua sponte* and may summarily dismiss on that ground.
11 *See Stone v. San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992); *Cartwright v.*
12 *Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981) (per curiam); *see also Granberry v.*
13 *Greer*, 481 U.S. 129, 134-35 (1987).

14 Because petitioner’s case is not yet final on appeal, the exhaustion issue here
15 is governed by the Ninth Circuit’s holding and reasoning in *Sherwood v.*
16 *Tompkins*, 716 F.2d 632 (9th Cir. 1983). There, the petitioner was seeking habeas
17 relief on the ground that he had been denied his right to appointed counsel and
18 free transcripts. *Id.* at 633. Although the petitioner’s state appeal from his
19 conviction still was pending, the petitioner arguably had exhausted his state
20 remedies with respect to the particular claim being raised in his federal habeas
21 petition. *Id.* The Ninth Circuit held that the federal habeas petition nevertheless
22 had to be dismissed for failure to exhaust state remedies:

23 When . . . an appeal of a state criminal conviction is pending, a
24 would-be habeas corpus petitioner must await the outcome of his
25 appeal before his state remedies are exhausted, even where the issue to
26 be challenged in the writ of habeas corpus has been finally settled in
27 the state courts.

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1 As we explained in *Davidson v. Klinger*, 411 F.2d 746, 747 (9th
2 Cir. 1969), even if the federal constitutional question raised by the
3 habeas corpus petitioner cannot be resolved in a pending state appeal,
4 that appeal may result in the reversal of the petitioner's conviction on
5 some other ground, thereby mooting the federal question.

6 *Sherwood*, 716 F.2d at 634 (footnote and remaining citations omitted).

7 Because petitioner's direct appeal is still pending, *Sherwood* requires that the
8 petition be dismissed. See *Henderson v. Johnson*, 710 F.3d 872, 874 (9th Cir.
9 2014) ("*Sherwood* stands for the proposition that a district court may not
10 adjudicate a federal habeas petition while a petitioner's direct state appeal is
11 pending." (citations omitted)).

12 IT IS THEREFORE ORDERED that this action be summarily dismissed
13 without prejudice, pursuant to Rule 4 of the Rules Governing Section 2254 Cases
14 in the United States District Courts.

15 LET JUDGMENT BE ENTERED ACCORDINGLY.

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17 Dated: June 22, 2017

18 
19 ANDREW GUILFORD
United States District Judge

20 Presented by:

21 /S/ FREDERICK F. MUMM
22 FREDERICK F. MUMM
23 United States Magistrate Judge
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